SOCORRO ELECTRIC COOPERATIVE, INC.

IBLA 81-754 Decided May 6, 1982

Appeal from decisions of New Mexico State Office, Bureau of Land Management, requiring submission of right-of-way permit charges, NM 42202 and NM 42998.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge, the legislative history of that provision reveals that Congress intended that free use be restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

APPEARANCES: Lance R. Bailey, Esq., Socorro, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Socorro Electric Cooperative, Inc. appeals from decisions of the New Mexico State Office, Bureau of Land Management (BLM) dated June 2 and 3, 1981, requiring payment of right-of-way rental charges. BLM set the rental at $25 for 5 years for each permit.

Appellant filed two right-of-way applications with BLM under section 501(a)(4) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(4) (1976). The first application, NM 42202, filed August 25, 1980, is for a right-of-way 619 feet long and 20 feet wide to construct an aerial 14.4 KV powerline which is needed to provide power to an existing communication site under right-of-way grant to Western New Mexico Telephone Co., Inc. (NM 40668). The

second application, NM 42998, filed on November 3, 1980, is for a right-of-way 9,265 feet long and 20 feet wide to construct an aerial 14.4 KV electric distribution line to provide power for a well and pipeline which is a BLM range improvement project needed to supply livestock water for the Pequeno and Torreon grazing allotments.

In its statement of reasons appellant contends that it is entitled to an exemption from paying the rental charges. Appellant explains as follows:

> Pursuant to the Regulations in 43 CFR, Part 4.400-402 and 4.411-414, we feel that The Socorro Electric Cooperative, Inc., is entitled to an exemption in that we are a non-profit making corporation which is not controlled by a profit making corporation and further that we are actively engaged in public activity to benefit public health, safety and welfare.
>
> In the interim we will most respectively withhold our payment on these two files until this matter is resolved.
>
> Further, any improvements used or connected with this Cooperative are wholly owned by its members and said improvements used exclusively to further the health, safety and welfare of the public in our area.
>
> I sincerely hope that this letter gives you the information you need, I have tried to be as concise as possible, but as you know dealing with regulations can sometimes be cumbersome. Please let me know if I may be of further assistance in providing information of this nature.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976) provides in applicable portion:

> (g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The relevant regulation, 43 CFR 2803.1-2(c), states:

> (c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:
>
> (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.
>
> (2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.
>
> (3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

[1] We recently held in Tri-State Generation & Transmission Association, 63 IBLA 347, 89 I.D. (1982), that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. 1/ Appellant is not an agency of the Federal Government, and while its rental charge is certainly token, BLM obviously has determined that the cost of collection is not unduly large. Therefore, appellant is not entitled to an exemption from rental fees.

We need not determine whether appellant is entitled to be considered for a lesser charge, since appellant's charges amount to the regulatory minimum of $25 for 5 years. See 43 CFR 2803.1-2. We note, however, that in Tri-State Generation & Transmission Association, supra, we held that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates from consideration for reduced charges under any category of 43 CFR 2803.1-2(c) cooperatives whose principal source of revenue is customer charges.

1/ Our interpretation was based on the legislative history of section 504(g) of FLPMA, supra:

> "Subsection (f). This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received."

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975) (emphasis added).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge